Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DAVID BRUCE, ROBERT CANADA
AND THOMAS PERZICHILLI,

Petitioners,

v.

THOMAS B. HEFFELFINGER, United States Attorney, District of Minnesota, individually; and ROBERT SMALL, Assistant United States Attorney, District of Minnesota, individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth Circuit's summary dismissal of petitioners' appeal for lack of jurisdiction without issuing a written opinion where the timing of petitioners' filing of their notice of appeal relied on a specific Order of the district court stands in direct conflict with this Court's doctrine of "Unique Circumstances" as stated in *Thompson v. INS*, 375 U.S. 384, 386-87 (1964).

2. Whether the Eighth Circuit's summary dismissal of petitioners' appeal for lack of jurisdiction without issuing a written opinion where the timing of petitioners' notice of appeal relied on a specific Order of the district court so far departs from the accepted and usual course of fairness in appellate proceedings under *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989) as to call for the exercise of this Court's supervisory power.

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Statement of Jurisdiction

The Judgment of the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) granting respondents' motion for dismissal for lack of jurisdiction under Eighth Circuit Rule 47A(b)was entered on February 28, 2005. Petitioners' Petition for Rehearing and Rehearing En Banc was timely filed. The Order of the Eighth Circuit Denying Petition for Rehearing and Rehearing En Banc was entered on May 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C § 1254 (1).

Statement of the Case

This action was brought by Robert Canada, an FBI agent, and David Bruce and Thomas Perzichilli, two local law enforcement officers then assigned to an FBI task force involved in a major drug investigation. At the request of their FBI supervisor, petitioners provided the supervisor with a document describing certain actions of DEA agents affecting the FBI investigation. The document prepared by petitioners was critical of the conduct of the two DEA agents involved in an overlapping drug investigation. The document was subsequently given, over the objections of the FBI supervisor, to respondent Small, who was then acting United States Attorney for the District of Minnesota. Small reacted to the document by terminating the FBI drug investigations being conducted by petitioners and placing petitioners in a "*Giglio*" impaired status, thus barring them from bringing cases to the United States Attorney for prosecution.

Petitioners and the FBI Supervisors, including the Special Agent in Charge (SAC) of the Minneapolis FBI office believed that the *Giglio* impairment placed on the petitioners by respondents was neither warranted nor justified by the *Giglio* policy of the Department of Justice. Unable to resolve the dispute, petitioners, with the approval of their supervisors,

commenced a civil action in state court alleging First Amendment claims and defamation against respondents in their individual capacities. Respondents removed the case to federal court and moved to dismiss the claims under Fed. R. Civ. P. 12 (b). After permitting petitioners to file affidavits from their supervisor and two SACs of the Minneapolis FBI office supporting their claims, the district court dismissed the claims and entered final judgment for the defendants on May 5, 2004.

Following a stipulation by the parties requesting a thirty day extension of time for petitioners to file their notice of appeal to the United States Court of Appeals for the Eighth Circuit (Eighth Circuit), the district court entered an Order dated June 23, 2004, granting petitioners an extension of time until August 5, 2004, to file their Notice of Appeal. The extension of time was requested by petitioners so they could bring a motion to unseal the case before the district court was divested of its jurisdiction pending an appeal. Respondents had obtained an Order sealing the case by motion at the same time they removed the case from state court to federal court.

On July 21, 2004, Respondents moved to extend the time for their response to petitioners' motion to unseal and also requested that the district court further extend the time for petitioners to file their Notice of Appeal. On July 22, 2004, the district court entered an Order granting respondents' motion to extend the time and ordering that petitioners could file their Notice of Appeal from the May 5, 2004, Judgment on or before the 20th day following the court's entry of its Order on petitioners' motion to unseal.

On October 4, 2004, the district court entered an Order granting petitioners' motion and lifting the seal from the case. On October 18, 2004, the fourteenth day following the court's Order unsealing the case, petitioners filed their Notice of Appeal from the May 5, 2004 final Judgment.

On December 15, 2004, respondents filed their motion to dismiss petitioners' appeal for lack of jurisdiction. Petitioners opposed the motion. On February 28, 2005, a panel of the Eighth Circuit entered an Order granting respondents' motion and summarily dismissing petitioners' appeal without written opinion pursuant to Eighth Circuit Rule 47A (b).

On April 6, 2005, petitioners filed a Petition for Rehearing and Rehearing En Banc. On May 12, 2005, the Eighth Circuit entered an Order denying petitioners' Petition for Rehearing and for Rehearing En Banc. This Petition for a Writ of Certiorari to the Eighth Circuit followed.

Statement of Federal Jurisdiction in the Court of First Instance

The action was originally commenced by petitioners in the Fourth Judicial District (Hennepin County) of Minnesota (state court) alleging, *inter alia*, violation of petitioners' rights to freedom of speech under the First Amendment to the United States Constitution. Based on petitioners' constitutional claim, respondents invoked federal jurisdiction and removed the case to federal court.

Argument

I. THIS PETITION MEETS THE COURT'S STANDARD OF COMPELLING REASONS FOR REVIEW ON A WRIT OF CERTIORARI

Petitioners respectfully request that this Court accept review of their petition for writ of certiorari to the Eighth Circuit Court of Appeals. The Eighth Circuit summarily dismissed Petitioners' appeal pursuant to Eighth Circuit Rule 47A (b), for lack of jurisdiction without reaching the merits of petitioners' claim that this Court's doctrine of "Unique Circumstances" required the Eighth Circuit to extend the

filing deadline. The district court's Order relied upon by petitioners for their "unique circumstances" argument had been issued at the request of Respondents. This Order established a new deadline for the filing of petitioners' notice of appeal in unambiguous and precise terms:

> "Upon consideration of the defendants' motion to extend the time within which they may oppose the plaintiffs' pending motion to set aside the order sealing the files and records of this case, and further extending the time within which the plaintiffs may file their Notice of Appeal,
>
> IT IS ORDERED that the defendants shall have until July 30, 2004 to file their opposition to plaintiffs' motion, and
>
> IT IS FURTHER ORDERED that the plaintiffs may file a Notice of Appeal from the May 5, 2004, Judgment dismissing the Complaint on or before the 20th day following the entry of this Court's Order on the plaintiffs' pending motion."

(Order dated July 20, 2004) (Emphasis added)

This was the Order that had been sought by respondents. The petitioners relied in good faith on this Order and met the filing deadlines ordered by the district court. Accordingly, under this Court's doctrine of "unique circumstances", petitioners were entitled to consideration by the Eighth Circuit as to whether it could exercise jurisdiction over the appeal. It is unquestioned doctrine in American law that *stare decisis* requires that once this Court has laid down a principle of law as applicable to a certain state of facts, courts of lower rank will adhere to that principle and apply it to all

future cases where the facts are substantially the same. The Eighth Circuit's summary dismissal of petitioners' appeal without a written opinion explaining their reasons denied petitioners their right to present and argue the merits of their appeal. In so acting, the Eighth Circuit violated the doctrine of *stare decisis* and the accepted and usual course of fairness in appellate judicial proceedings. *See*, Sup. Ct. R. 10(a).

Petitioners submit that the disregard of a party's right to an appeal in a United States Circuit Court of Appeals, such as the Eighth Circuit's unwarranted summary dismissal of their appeal, defeats the Appellate Rules established by this Court and requires the exercise of this Court's supervisory powers. *See*, Sup. Ct. R. 10(a).

Petitioners also submit that the summary dismissal of their appeal is a rejection by the Eighth Circuit of this Court's equitable doctrine of "unique circumstances" as articulated in *Thompson v. INS*, 375 U.S. 384, 386-87 (1964), and of the Eighth Circuit's own decisions in *Schwartz v. Pridy*, 94 F.3d 453, 456 (8th Cir. 1996), *Arnold v. Wood*, 238 F.3d 992, 996-97 (8th Cir. 2001), and *Charles v. Barnhart*, 375 F. 3d 777, 781-82 (8th Cir. 2004). In *Arnold* the Eighth Circuit said:

> "In sum, the 'unique circumstances' doctrine is appropriately cabined to instances in which the district court is unaware of the untimeliness of a post-judgment motion, and the appellant relies upon the court's erroneous representation that the motion is timely."

Arnold at 997.

In this case, the district court was obviously unaware of the fatal jurisdictional flaw in respondents' motion for an extension of time. Petitioners relied on the district court's erroneous Order representing that the filing of their Notice of Appeal within the time specified in the Order would be

timely. These facts were clearly before the Eighth Circuit in its consideration of respondents' motion for summary dismissal of petitioners' appeal. Notwithstanding these facts, the Eighth Circuit summarily dismissed the appeal without comment. Pursuant to Supreme Court Rule 10(a), the Eighth Circuit's disregard for fairness and this Court's precedents demand correction by this Court.

II. THE EIGHTH CIRCUIT'S SUMMARY DISPOSITION GRANTING RESPONDENTS' MOTION TO DISMISS PETITIONERS' APPEAL ON JURISDICTIONAL GROUNDS IGNORES THIS COURT'S DECISIONS REGARDING THE UNIQUE CIRCUMSTANCES DOCTRINE

A. The Petitioners Relied On The District Court's Order in Filing Their Notice Of Appeal

Notwithstanding the jurisdictional prerequisite that is the 60 day time period for filing notices of appeal under Federal Rule of Appellate Procedure 4(a)(5)(A), the circuit courts of appeal are empowered to grant an extension within the narrow confines of the doctrine of "unique circumstances." This Court first established the doctrine in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Prior to expiration of the 30 day period within which to appeal the district court's rulings, the district court in *Harris* found excusable neglect and granted the losing party's motion to extend the time to file its notice of appeal. *Id.* at 216. Finding no excusable neglect and noting that the applicable time requirement within which an appeal in that case had to be taken was "mandatory and jurisdictional," the Court of Appeals for the Seventh Circuit dismissed the appeal as untimely. *Harris Truck Lines, Inc. v.*

Cherry Meat Packers, Inc., 303 F.2d 609, 611-12 (7th Cir. 1962). In vacating the decision, this Court stated the following:

> "In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30 day period and then suffers reversal of the finding, it should be given great deference by the reviewing court."

Harris, at 371 U.S. at 217.

This Court determined that the "unique circumstances" of the case were such that the court of appeals "ought not to have disturbed the motion judge's ruling." *Id.*

Soon after *Harris* was decided, this Court, in *Thompson v. INS*, expounded on the "unique circumstances" doctrine by including within its ambit cases wherein a party does an act deemed proper by the district court, which, if indeed properly done, postponed the deadline for the filing of the party's appeal and led to an appeal that was timely under a new but mistaken deadline. *Thompson*, 375 U.S. 384, 387 (1964). This Court later described the doctrine in *Osterneck v. Ernst & Whinney* as excusing tardiness in filing "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal, and has received specific assurance by a judicial officer that this act has been properly done," *Osterneck*, 489 U.S. 169, 179 (1989).

The "unique circumstances" doctrine applies squarely to the circumstances of petitioners' filing of their notice of appeal to the Eighth Circuit. Petitioners first obtained a proper 30 day extension of time pursuant to Federal Rule of Appellate Procedure 4(a)(5)(A) to file their notice of appeal. This was to give the court time to rule on their motion to

remove the seal placed on the case before the district court was divested of jurisdiction pursuant to the appeal.

With three weeks remaining under the first and proper extension of time for petitioners to file their notice of appeal, respondents moved for a further, and improper, extension of the time for petitioners' to file their notice of appeal. The reason given by respondents' for their motion was that their counsel had a busy trial schedule. The district court granted respondents' motion and ordered that "the plaintiffs may file a Notice of Appeal from the May 5, 2004, Judgment dismissing the Complaint on or before the 20th day following the entry of this Court's Order on the plaintiffs' pending motion." (District Court's Order dated July 22, 2004)

Petitioners filed their notice of appeal within the 20 day period ordered by the court following the district court's Order lifting the Seal. Clearly, neither the district court nor petitioners' counsel believed that petitioners' actions in following the court's order would make their notice of appeal untimely. Shortly after petitioners' filed their notice of appeal, respondents moved for a summary dismissal of the appeal on grounds that petitioners' appeal was untimely.

Whether respondents, represented by counsel from the litigation and appellate divisions of the United States Department of Justice, knew that their motion would blind-side the district court and the petitioners and create an issue of jurisdiction is not clear. In circumstances like these, where an untimely filing is prompted by the motion of the non-appealing party, the Eighth Circuit's summary dismissal sends a message to the government that such tactics may succeed in misleading a district court and thereby derail an appeal. Such tactics would unquestionably create disrespect for the rule of law and incivility between litigants.

An Order by a district court granting the motion of the respondents to improperly extend the time for filing an appeal and relied upon by the petitioners to their detriment present